

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1020-CR

Cir. Ct. No. 2011CF1377

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TDUARDO JACQUES HEAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Tduardo Jacques Head appeals a judgment convicting him of three counts of delivering cocaine, one count of possession of cocaine with intent to deliver, one count of possession of heroin with intent to deliver, and one count of keeping a drug house. He also appeals the circuit court's

order denying his motion for a new trial. Head argues that he received ineffective assistance of trial counsel because his lawyer did not object to portions of Special Agent Raymond Taylor's testimony. We affirm.

¶2 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Strickland*, 466 U.S. at 697.

¶3 Head first argues that his lawyer should have objected to Taylor's testimony describing how persons in the drug trade use strainers, plastic bags, aluminum foil, and digital scales, all items that were recovered from Head's apartment. Head contends this testimony was improper because Taylor was not formally qualified as an expert witness.

¶4 Head's argument is unavailing because he cannot show that he was prejudiced. Taylor testified that he had over twenty years of experience in law enforcement, including ten years as a police officer and ten years working as a special agent for the Wisconsin Department of Justice. Taylor testified that he specialized in investigating mid-level and upper-level drug traffickers and had conducted investigations in fifty to one hundred different cases in the prior year alone. He also testified that he was involved in executing drug search warrants in

thousands of cases over the span of his career. Taylor's testimony about his qualifications established that he was highly knowledgeable about and experienced in investigating the drug trade. If Head's trial lawyer had objected to Taylor's testimony on the grounds that Taylor was not qualified as an expert, the circuit court would have qualified him as an expert, as the circuit court explained in its order denying Head's motion for a new trial. Because there is no reasonable probability that the result of the proceeding would have been different if Head's lawyer had objected, Head cannot show that he was prejudiced. Therefore, we reject Head's claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687 (a defendant receives constitutionally ineffective assistance of counsel when his lawyer's deficient performance prejudices him).

¶5 Head next argues that his lawyer should have objected when the prosecutor asked Taylor whether it was his opinion that the quantity of drugs and the paraphernalia found at Head's house indicated that Head was selling the drugs, to which Taylor responded, "yes." Head contends that questions about the significance of the quantity of drugs and the significance of the paraphernalia found by police should have been posed as hypothetical questions, not as questions pertaining specifically to this case.

¶6 Taylor's testimony was allowed under WIS. STAT. § 907.04 (2013-14),¹ which provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Under this statute, Taylor was allowed to give his opinion

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

about whether Head was selling drugs, which was an “ultimate issue” the jury needed to decide in order to render a verdict.

¶7 Head counters that WIS. STAT. § 907.04 applies only to expert witnesses, and Taylor was a lay witness since he had not been formally qualified as an expert. As we previously explained, however, Taylor *would have been qualified as an expert witness* if Head’s lawyer had objected. Head cannot show that he was prejudiced by his lawyer’s failure to object because there is not a reasonable probability that the result of the proceeding would have been different if he had. *See Strickland*, 466 U.S. at 687. We reject Head’s argument that he received ineffective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

